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# Getting Right with the Great Chief Justice

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# GETTING RIGHT WITH "THE GREAT CHIEF JUSTICE"

R. Kent Newmyer\*

In delivering the Inaugural John Marshall lecture last year, Professor G. Edward White used Oliver Wendell Holmes's speech on John Marshall to understand Holmes.<sup>1</sup> I would like to use Holmes's remarks on Marshall to understand Marshall, at least as the starting point for our effort to "get right" with him. If we can understand Marshall and his legal world rightly, perhaps we can appreciate our own more fully. So with your kind indulgence, let me travel back a century to Holmes's speech (briefly) and then back two centuries to Marshall and his world.

## The Single Representative Figure of American Law

Holmes was Chief Justice of the Massachusetts Supreme Judicial Court in 1901 when he delivered his comments celebrating the centennial of Marshall's assumption of duties as chief justice in 1801. For openers, Holmes said what everyone expected him to say—and what dozens of praiseful lawyers and judges across the country were saying in 1901: "If American law were to be represented by a single figure, skeptic and worshiper alike would agree without dispute that the figure could be one alone, and that one, John Marshall."<sup>2</sup>

After that deferential bow, Holmes invited his audience to ponder a paradox—the kind Holmes himself loved, as some-

Courtesy  
of the  
Hon.  
Douglas P.  
Woodlock.



**John  
Marshall**  
Litho-  
graph,  
1844  
William  
Henry  
Brown.

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1. G. Edward White, *Looking at Holmes Looking at Marshall*, 7 MASS. LEGAL HISTORY 63 (2001).

2. OLIVER WENDELL HOLMES, *John Marshall*, in COLLECTED LEGAL PAPERS 270 (1920).

thing to activate the mind. "If I were to think of John Marshall simply by numbers and measure in the abstract," he said, "I might hesitate in my superlatives."<sup>3</sup> And hesitate he then did. Rather than depicting Marshall as a Promethean figure who defied history to shape history, Holmes instead observed that he "represented a great ganglion in the nerves of society."<sup>4</sup> Or, in a similar vein, that Marshall was "a strategic point in the campaign of history, and part of his greatness consists in his being *there*."<sup>5</sup> To drive the point home, he then declared irreverently that "after Hamilton and the Constitution itself," Marshall had not much to offer beyond "a strong intellect, a good style, personal ascendancy in his court, courage, justice and convictions of his party."<sup>6</sup> No small matters these, we might observe, but in Holmes's assessment, not the stuff of true greatness.

There is a distinct taste of sour grapes in Holmes's back-handed compliments. Professor White attributed this fact to Holmes's frustration at being merely the chief judge of a state court, a position not calculated to display his true genius.<sup>7</sup> In addition to being vainly ambitious, however, Holmes was a deep student of American legal history. He was also a keen observer of lawyers, judges, and indeed, of humanity in general. His irreverent assessment of Marshall is worth attending to. First, Holmes supplied some much needed critical perspective on Marshall, who in 1901, was being wrested from his own age to adorn the American nation state. "It is [cautioned Holmes] idle to take a man apart from the circumstances which, in fact, were his."<sup>8</sup> Holmes also broached the issue of Marshall's originality: what, if anything, it means in terms of constitutional law and whether it was a necessary attribute of Marshall's greatness.

In all of his remarks, Holmes looked to Marshall's own age, insisting that historical context is the essence of biography. What we are left to ponder is what was it about Marshall's age that invited so much greatness? On a related note, how did Marshall's unique qualities of mind and heart mesh with history to shape his age and ours?

Here in a nutshell is the basic question facing all biographers: how much do the times make the man (or woman) and how much does the man (or woman) make the times. With this question in mind, then, let's look at Marshall's rendezvous with history. How did he shape American constitutional law and

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3. *Id.* at 267.

4. *Id.*

5. *Id.*

6. *Id.* at 269.

7. White, *supra* note 1, at 70-71.

8. HOLMES, *supra* note 2, at 267.

make the Supreme Court a major player in American government?

### **Marshall's Times**

First the times. The years between Marshall's birth in 1755 and his death in 1835 were uniquely formative. During no other period in American history was there so much to be accomplished, so much incentive to direct the course of events. Several factors account for the creative potential of these years, but the American Revolution was the heart of the matter. By the "Revolution" I mean not only the war itself, but also the debate that preceded the fighting and the period between the end of the war in 1783 and the ratification of the Constitution in 1788. No other event in our history educated those it touched more profoundly—if by education we mean the manner in which a culture conveys and transforms itself from one age to the next. No other generation of Americans witnessed the birth of the nation. Never before or since would the reasons for war or the possibilities of peace be so thoroughly and brilliantly discussed by so many. Finally, never would the principles of government settled on be so deeply rooted in the simultaneous acts of thinking and fighting and lawmaking. Never would principles of government and law be so thoroughly tested in the laboratory of real politics as during this prolonged period of constitution-making.

For twenty of his first thirty-two years, as a young man growing up on the northwest frontier of Virginia, Marshall was bombarded with the republican lessons of the Revolution. Under his father's tutelage, from 1765 to 1775, he followed the transforming debate in Virginia over liberty, power, and empire. For six years, first as an officer in the Culpeper militia and then in Washington's Continental Army, he fought to protect the principles of liberty agreed upon in the preceding debate. For another six years, as a novice lawyer and member of the Virginia legislature, he labored to implement those principles in the context of state politics shaped by the Articles of Confederation. During the debate over ratification of the new Constitution in Virginia in 1788, the thirty-three year-old lawyer stepped forth on the national stage as a forceful champion of the new nation and the new Constitution.

Put yourself in Marshall's boots. He was born a citizen of the glorious British Empire and with every prospect of becoming, like his father, a respectable member of the Anglo-Virginia gentry. The Revolution changed all that. Fighting made him a traitor. Winning made him a patriot citizen of the new republic and a life-long champion of the national union. And, signifi-

cantly for Marshall's education, the American Revolution was a constitutional war—one replete with fundamental lessons about government, about leadership (Washington was Marshall's model statesman), about public service, and most importantly for Marshall, about the danger of states' rights which hampered the war effort. Marshall's constitutional nationalism was born at Valley Forge.

Being there at the creation encouraged Marshall and his contemporaries to think and act boldly in the job of nation-building. The public arena was small, the whole country in 1790 had half as many people as New York City today. The number of aspiring statesmen was small, especially in Virginia where it was assumed that only the elite were qualified to govern. Institutions were fluid and malleable. Young and ambitious men and women who venture inside the Beltway today are apt to be suffocated by entrenched institutions and attitudes. In Marshall's age every act was a precedent.

Abigail Adams, wife of the president who put Marshall on the Court, captured the potential of the age elegantly in a letter to her young son John Quincy Adams in 1779:

These are times in which a genius would wish to live . . . . Great necessities call out great virtues. When a mind is raised, and animated by scenes that engage the heart, then those qualities which would otherwise lay dormant, wake into life and form the character of the hero and the statesman.<sup>9</sup>

### **His "Great Necessities"**

And what were those "great necessities" that called forth greatness? For Marshall the issue that engaged his heart and mind was nation-building. As his famous biographer, Albert Beveridge, put it: "American nationalism was Marshall's one and only great conception, and the fostering of it the purpose of his life."<sup>10</sup> On this general goal, Marshall did not differ from other statesmen of the founding generation. The problem was the "founding brothers" could not agree on what the new nation should look like: whether it should be agrarian or commercial and manufacturing; slave or free; democratic and egalitarian or republican and aristocratic. In time, these cultural differences of opinion translated into a struggle between nationalists in the North and states' rightists in the South. The political differences

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9. DAVID McCULLOUGH, *JOHN ADAMS* 226 (2001).

10. 4 ALBERT BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 1 (1916-1919).

between the sections, moreover—as Alexis de Tocqueville famously observed—were bound to appear before the Supreme Court as constitutional questions.<sup>11</sup>

In our age, the dominant theme of constitutional law is civil rights. In Marshall's age, the great issue was the nature of the federal union under the Constitution and finally, as Marshall saw it, whether there would be a Union at all or a mere collection of sovereign states. If Marshall infused his jurisprudence with the "passion of his own intense convictions," as Benjamin Cardozo claimed,<sup>12</sup> it was because there was so much at stake. If he worked tirelessly to consolidate the interpretive authority of the Court, it was because he wanted to enlist the Court in this great struggle.

It was a contest, I might add, that pitted Marshall against the dominant states' rights theorists of his own state: Thomas Jefferson, James Madison, Spencer Roane of the Virginia Court of Appeals, John Taylor of Caroline County (who wrote three books in three years to refute Marshall's jurisprudence) to mention only some. In fact, the constitutional history of the early republic at times seems like a domestic quarrel among the statesmen of the Old Dominion. In this constitutional shoot-out, the chief protagonists were Chief Justice Marshall and his second cousin, President Thomas Jefferson. It was surely one of the most creative mutual hatreds in American history.

### Where He Stood

And where did Marshall stand in this battle over constitutional union? Ironically it was his opponents—Jefferson, Roane and company—who first asked and answered that question. Marshall's opinion in *McCulloch v. Maryland*<sup>13</sup>—upholding the constitutionality of the Second Bank of the United States by way of implied powers—called them to the barricades. Marshall, they claimed, had bamboozled his fellow justices and turned the Court into his own instrument for destroying the states and consolidating power in the national government.

Many historians resist the notion that Marshall single-handedly rewrote the Constitution. But many, including Albert Beveridge, whose great biography won the Pulitzer Prize in 1920, depict the chief justice as an uncompromising nationalist who molded the Constitution to his own liking. In this scenario, the Marshall Court was on the cutting edge of American history as it moved in a straight line toward the post-New Deal nation

11. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 357-58 (Henry Reeve trans., Francis Bowen ed., Cambridge: Sever and Francis 1862) (1835).

12. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 170 (1921).

13. 17 U.S. (4 Wheat.) 316 (1819).

state. In the process, the mythical Marshall came to symbolize and legitimize the so-called “living constitution,” wherein the justices freely amend the document to meet the changing needs of the American people.

The truth is much less dramatic and much more complicated. Without a doubt Marshall put the Constitution on a sound nationalist footing. But he was not a *consolidating* nationalist who aimed to destroy the states. Nor did he play free and easy with the Framer’s Constitution or run roughshod over his colleagues on the Court to do so. As Marshall saw it—read his despairing letters to his friend and colleague Joseph Story—he was not creating a new constitution. Instead, he was fighting to preserve the one that his states’ rights enemies wanted to replace with the old Articles of Confederation. He sincerely believed that he was on the losing side of antebellum history. And he had a point—witness the all-out attack on the Court in the 1820s, culminating in the election of Andrew Jackson in 1828. President Jackson opposed nullification and threatened to hang the nullifiers, to be sure. But he also refused to enforce the Marshall Court’s decisions in the Cherokee Indian cases, and in general, went along with the movement to curb the Court which had been underway across the nation since the 1820s. Most threateningly, he appointed new justices to the Supreme Court who agreed with his small government, states’ rights philosophy. Two years after Marshall’s death in 1835, seven of the nine justices were Jacksonians, including the new Chief Justice, Roger Taney.

As a young man of the Revolution, Marshall had been on the cutting edge of history; increasingly he was on the margin. During the last years of his life, he saw himself as a Burkean conservative dedicated to preserving the Constitution and the republic from the ideological demagoguery of democratic politicians. He may have been a “ganglion of nerves” designed to register the feelings of the times, as Holmes said, but he was also fundamentally at odds with two of the dominant historical developments of his own age—states’ rights and political democracy—both of which he traced to Jefferson. Recognizing this fact throws a new light on his jurisprudence and on his effort to strengthen the Court as an institution.

So how does this view of antebellum history revise our understanding of Marshall’s jurisprudence? His place in American history? The tendency has been to assess his legacy in terms of legal doctrine as set forth in his great opinions: implied powers in *McCulloch v. Maryland*; national authority over interstate commerce in *Gibbons v. Ogden*;<sup>14</sup> and so on. Definitive great cases

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14. 22 U.S. (9 Wheat.) 1 (1824).



make for compelling drama, which historians and biographers love—and lawyers, too, since they need clear and definitive precedents to bolster their arguments. Both historians and lawyers, then, are tempted to see Marshall's opinions as perfect constitutional truth issuing from the brow of Jove.

His famous nationalist opinions look differently, however, when we view them not as efforts to *rewrite* the Constitution but to *preserve* it. They appear in a different light when we consider—as Marshall himself assuredly did—that doctrinal compromise was often necessary on a divided Court, and that it was essential to survival in a hostile political world, where the Court's enemies had the upper hand.

Take *Marbury v. Madison*<sup>15</sup> as a case in point. Lawyers and historians alike have seen that opinion as having settled judicial review in one glorious moment and for all time. Over the years, the Supreme Court itself has cited the case literally thousands of times—whenever they needed to bolster their interpretive authority. A careful reading of the opinion, however, shows that Marshall did not claim that the Court's interpretation was final, or that it was binding on congress. Indeed, as a precedent, the opinion technically applied only to congressional acts *dealing with judicial power*. In short, Marshall did not say more than the traffic would bear, which may explain why there was almost no opposition to the judicial review portion of the opinion in 1803—even from the Jeffersonians.

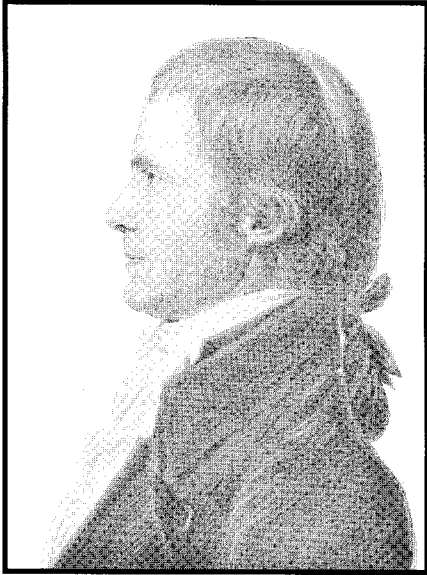
Or take *Gibbons v. Ogden*—also cited thousands of times as if it settled the matter of federal commerce power once and for all. A careful reading, however, reveals a delicate and nuanced treatment of the matter. In laying out the sweeping definition of federal commerce power in that case, for example, Marshall refused to hold that congressional authority automatically excluded the states (a point urged on him at the bar by Daniel Webster and by his colleague Justice Story). Instead, he held that, short of a direct conflict between state and federal statutes, states had concurrent power over interstate commerce. His opinion also adumbrated the idea of state police power which in certain circumstances might trump even federal commerce power. Even the states' rightists found little to complain about. The nuances in Marshall's opinion, moreover, gave subsequent courts room to maneuver. Perhaps we should not be surprised that Justice Clarence Thomas and Justice Stephen G. Breyer should both cite *Gibbons* in the same case<sup>16</sup> to prove opposite points.

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15. 5 U.S. (5 Cranch) 137 (1803).

16. *United States v. Lopez*, 514 U.S. 549; 584, 593-96 (Thomas, J., concurring); 615 (Breyer, J., dissenting) (1995).

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Boston.



**John  
Marshall**  
From a  
crayon by  
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From **John  
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The  
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Boston,  
1901.

Consider *McCulloch*, the most hotly contested of Marshall's nationalist opinions. That opinion seems far less radical—as Marshall himself insisted—when it is recalled that the constitutionality of the national bank via implied powers had been recognized for thirty years by congress and by presidents from both parties. Marshall's powerful exposition of constitutional nationalism in that opinion, moreover, was not gratuitous aggression as Roane and Jefferson charged, but was a response to the demagogic, union-busting states rights' arguments of counsel for Maryland.

What I'm suggesting here is that Marshall, far from being blindly consolidationist, tried to balance national and state authority (which is precisely the point argued brilliantly by James Madison in *The Federalist* No. 39). Among the powers Marshall conceded to the states was control over the institution of slavery. Marshall himself was a slave holder and a Southerner to boot. But, here as elsewhere, Marshall followed the intent of the Framers (who in marking the line between state and federal authority were behaving like the practical-minded political realists they were). Like the Framers, Marshall understood the preeminence of state and local government in the lives of the American people at that time—and obversely, the fragility and experimental nature of the new Constitution. As Princeton historian John Murrin has noted, the Constitution was “a roof without walls”—for many decades “a substitute for any deeper national identity.”<sup>17</sup> If the Framers had attempted to destroy the states, their Constitution could not have been ratified by the states. If Marshall would have attempted to do so, he would have doomed both the Court and the Constitution.

In other words, Marshall was not making constitutional law wholesale, but rather was following the “intent of the Framers.” “Original intent” is a problematic and hotly-debated concept at present. Not so in Marshall's age. The simple reason is that the Marshall Court was attempting to answer the same questions that the Framers of the Constitution addressed: interstate com-

17. John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 346 (Richard Beeman et al. eds., 1987).

merce, state-issued paper money and national currency, to mention only the most obvious. In answering these questions the conservative, property-minded Framers turned into real radicals. They created a nation where there was none. If Marshall appeared to be an extreme nationalist, it was because he struggled to maintain the nationalism of 1787 when the tide of history was running against it.

This was the "campaign of history" to which Holmes referred. Like Washington, his patron and model statesman, the chief justice was a commander in the field, constantly assessing the lay of the land, the strength of the Court's enemies, and playing to their weaknesses and his strengths. In this setting, judicial strategy was a major component of his greatness—and his originality. He had enough sense not to theorize or philosophize when to have done so would have invited counterattack. In his great opinions he knew when to hold and when to fold. Whichever position he chose, he defended with impeccable logic embossed with some of the most quotable rhetoric in the Court's long history.

### His Design

I've been arguing that Marshall's great opinions need to be read for the nuances and shades of meaning. Now I would like to suggest that we should look beyond the separate opinions entirely and search for the design in the tapestry of his jurisprudence. Doing so reveals a remarkable pattern—one in which *McCulloch*, *Gibbons* and his Contract Clause opinions were interconnected and mutually supportive. The common policy denominator of these opinions was national market. By striking down state laws interfering with contracts; by preventing states from interfering with interstate commerce; by giving congress authority to create a uniform national currency and a national transportation system, Marshall hoped to encourage the growth of an "economic e pluribus unum," as he called it in *Gibbons* (a phrase he borrowed from Webster's argument).<sup>18</sup>

To state the point somewhat differently: Marshall realized that judicial pronouncements, however eloquent, could not themselves preserve the Federal Union. The American people, as he was fond of saying, had created the Union, and only they could preserve it. And being ordinary mortals (and not political saints), they needed a self-interested reason for doing so. National economic prosperity based on cooperation among all the sections was the reason. Americans fought together during the Revolution to create the nation, now with the Court's help they

18. 22 U.S. (9 Wheat.) at 14.

could work together to preserve and strengthen the nation they created.

To forge national identity around economic self-interest would take time, however, and time was running out. The last ten years of Marshall's tenure was dedicated to conserving the beachhead he won during the first twenty. With the Court's external enemies in power, with new states' rights justices nipping at his heels, it was a true test of leadership. And it is to Marshall's leadership of the Court—and his transformation of the Court as an institution—on which I would now like to focus.

### **His Institution**

To appreciate the significance of his accomplishment, we need to retrace our steps and glance briefly at the Court as it stood in March, 1801, when he took charge. It was not an inspiring sight. Indeed, everything pointed to the Court's permanent status as the "least dangerous branch," as Hamilton called it in *The Federalist* No. 78. This is not to gainsay the progress made during the 1790s. The Court was an ongoing concern, and its place in the overall structure of the federal judicial system had been settled by the Judiciary Act of 1789. Rules of the Court had been agreed upon by the justices. Circuit riding was implemented (to the dismay of all). The justices had issued a handful of important constitutional decisions—enough to suggest the Court's yet unrealized powers of judicial review.

The Court's disabilities, on the other hand, were immense. Important decisions there had been, yes, but only about one a year (hardly enough to keep six ambitious justices engaged). Not surprisingly, there was a rapid turnover during the first decade. Chief Justice Jay even resigned to become governor of New York! Presidents Washington and Adams also had trouble filling vacancies (Marshall himself being one of those who turned down an associate justiceship). In truth, Congress, not the Court, was the center of constitutional action in the 1790s. More ominously the Virginia and Kentucky Resolutions of 1798—drafted secretly by Madison and Jefferson—argued that the states, not the Supreme Court, should settle disputed constitutional issues. An argument Marshall answered in *Marbury v. Madison*, by the way.

Finally, because all the justices were Federalists and because the Court's decisions followed Federalist priorities, the Court got caught up in the violent party battles of the 1790s—unfortunately on the losing side. The disputed election of 1800, wherein the Jeffersonians took political control of the federal government, set the stage. President Adams made Marshall chief justice with the rather desperate hope that the Court, under his leader-

ship, could contain the states' rights radicalism of the new president and his party. For his part, President Jefferson set out to humble the Court and eradicate "the spirit of Marshallism," as he put it to James Monroe in April, 1800.<sup>19</sup> The gauntlet was down.

So, given the Court's vulnerabilities to the political branches and growing force of states rights, how did the new chief justice manage to elevate the Court as an institution? The Court's forceful assertion of its rightful jurisdiction, of course, comes to mind, not just in *Marbury*, but also in *Martin v. Hunter's Lessee*<sup>20</sup> and *Cohens v. Virginia*<sup>21</sup>—the latter being Marshall's most eloquent statement on national union and the Court's appellate authority.

What might be overlooked by focusing on these famous decisions, however, is the silent institutional revolution instituted by Marshall, which gave these decisions meaning and, indeed, which gave meaning and clout to all the decisions of the Marshall Court (and every Court thereafter). I'm referring to a major shift in the Court's working procedures: the shift from the practice where each justice wrote a separate opinion to a single majority opinion written by one justice. Seriatim opinions was the practice in England, in colonial America, in state courts, and in the Supreme Court in the 1790s.

Marshall changed this tradition. Not only did he persuade his colleagues to submerge their own opinions into a majority opinion, but in nearly all the great constitutional cases he spoke for the majority. This new mode of proceeding proved to be permanent, despite the efforts of Justice William Johnson, at the insistence of Jefferson, to reinstate seriatim opinions. A revolutionary change had taken place, one which transformed the Court. For until the justices spoke in one voice, *as an institution*, the Court could not claim to be the authoritative interpreter of the Constitution, which is the real meaning of judicial review.

How did Marshall pull off this stunning victory against such odds? One factor, as Justice William Johnson explained to Jefferson in 1822—in a brutally frank, overstated, but partly true letter—was the weakness and laziness of Marshall's colleagues during the first years of his tenure.<sup>22</sup> Even more important in explaining the Court's new unity was the unyielding hostility of the Jeffersonians to the Court which Marshall used to unite his

19. Letter from Thomas Jefferson to James Monroe (Apr. 12, 1800), in 19 WORKS OF THOMAS JEFFERSON 120 (Andrew A. Lipscombe & Albert Bergh eds., 1903).

20. 14 U.S. (1 Wheat.) 304 (1816).

21. 19 U.S. (6 Wheat.) 264 (1821).

22. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), Jefferson Papers (MSS Library of Congress), quoted in DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 181-82 (1954).

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Woodlock.



*Joseph  
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Litho-  
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William  
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colleagues. Most important of all in this process of institutional unification was the chief justice himself: the way his legal genius, his character, and his personality fit the unique institutional circumstances of the early Court. “Being *there*” was important as Holmes suggested. No less important was the fact that it was *John*

*Marshall* who was there. Consider, for starters, the way his legal and intellectual strengths suited the daily working procedures of the Court. In an age when well over ninety percent of the Court’s business had to do with the common law, it helped that Marshall was a superb common law lawyer with twenty years of experience in the state and federal courts of Virginia. In the period before printed briefs, when the lag-time between oral argument and decision was a matter of weeks if not days, it helped that Marshall was a quick learner with a quick pen. A look at the nine brilliant newspaper essays he wrote in defense of *McCulloch* in the course of thirteen weeks tells us just how quick he was and how persuasive. In an age when justices had no help from clerks, they rose or fell on

the basis of demonstrated ability, and in the intimate setting of the Court back then there was literally no place to hide. In the give-and-take of judicial conference, ability counted and here Marshall had a leg up; with ability came authority.

But authority, if that is the right word, was administered with gentleness, restraint, modesty and humor, and therein lies the key to Marshall’s success in unifying the Court. Unfortunately for historians, it is hard to catch the chief justice in the act of leading. There are few telltale Court papers from this early period, no internal memos, no judicial memoirs, and no law clerks to tell all. Marshall’s own papers contain only a few tantalizing tidbits and no smoking guns.

Occasionally, however, the veil of secrecy parts—for example when Marshall’s future colleague Joseph Story caught a glimpse of the chief in action when he visited the Court in 1808. Story was struck by the quality of Marshall’s legal mind, how he “unravels the mysteries with irresistible acuteness” and “subtle logic.” But what impressed Story most of all was Marshall’s personality and his style of leadership. His manners wrote Story,

were "plain, yet dignified" and he had "an unaffected modesty that diffused itself through all his actions." Story loved his laugh, too, which was "too hearty for an intriguer." And "his good temper and unwearied patience are equally agreeable on the bench and in the study."<sup>23</sup>

Those who knew Marshall agreed with Story's assessment—except for Jefferson and Spencer Roane. Even his ideological opponents, Patrick Henry and John Randolph of Roanoke, loved him for his decency and patriotism. Perhaps no one summed up Marshall's character so well as Jared Sparks, the biographer of Washington (as was Marshall) and the future president of Harvard. In 1826, Sparks went to Richmond to pay his respects to the aging chief, and came away in awe of Marshall's republican character. The blending into a consistent whole, as he put it, of "all things about him—his house, grounds, office, himself," and how they all "bear marks of a primitive simplicity and plainness rarely to be seen combined."<sup>24</sup>

For contemporaries on and off the Court, Marshall symbolized the republican legacy of the Revolution. Now observe how perfectly Marshall's republican personality fit the unique living and working arrangements of the Court. In Marshall's time, the justices spent only a couple of months a year in Washington, the rest of their time was spent riding the circuit as trial judges. Because the new capital was such a miserable place to live, they (like members of the political branches) left their families at home and took up quarters in one of the city's numerous boarding houses. The boarding house, of necessity, was easily converted into an informal conference room where arguments and debates of the day continued over dinner and wine.

Marshall took care of these living arrangements himself and probably chose the wine as well. (He ordered wine for his Richmond cellar by the pipe—which is 126 gallons!) He was also the chief beneficiary of them, because the intimate setting was a perfect venue for his egalitarian, democratic, modest style of leadership. His signal accomplishment—even while he directed traffic and performed the lion's share of opinion writing—was to see to it that his colleagues shared in the collective deliberations of the Court, even if they disagreed with the majority opinion as they increasingly did. As Marshall explained in his public debate with Roane in 1819:

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23. Letter from Joseph Story to Samuel P.P. Fay (Feb. 25, 1808), in 1 *THE LIFE AND LETTERS OF JOSEPH STORY* 166-67 (William Wetmore Story ed., Boston, C.C. Little and J. Brown 1851).

24. Interview with Jared Sparks in Richmond, Va. (Apr. 1, 1826), in 10 *PAPERS OF JOHN MARSHALL* 283-84 (Charles Hobson ed., 2000).

The opinion . . . delivered as the opinion of the court, is previously submitted to the consideration of all the judges; and if any part of the reasoning be disapproved, it must be so modified as to receive the approbation of all, before it can be delivered as the opinion of all.<sup>25</sup>

By facilitating a collective deliberative process among his colleagues, Marshall invited them to think of themselves not as six isolated justices—which they had been—but as a single entity, a branch of government on a par with congress and the executive no less.

Looking at the way Marshall infused the Court with his own personality during its most formative period, one is inclined to think Emerson got it right when he said, “An institution is the lengthened shadow of one man.”<sup>26</sup> No other figure in American history, I would venture to say, has done so much to give permanent shape to an institution of government.

### Losing the Final Word

And so you might well ask: why did Marshall’s despondent letters to his friend Story in the 1830s bemoan the demise of the Court and the Constitution? Why did he die thinking he had failed—when he is now celebrated as the *representative figure* of American law? Although complicated, the answer is that antebellum history—his states’ rights opponents to be specific—taught him that the Supreme Court (despite its miraculous advancement) did *not* have the final word on the Constitution. Several simultaneous developments drove home that bitter lesson. One such was the long tradition of successful state resistance to the Court’s decisions: nullification in South Carolina and Georgia’s resistance to the Cherokee Indian decisions being only the last of a long line. As a member of the Virginia Constitutional Convention of 1829-30, he heard the unhinging rhetoric of tidewater slave holders who threatened to fight anyone who challenged their power and the institution of slavery—whether it be the abolitionists of the North or the democratic farmers of western Virginia who were trying to gain fair representation in the Virginia legislature. Marshall hoped that the Supreme Court could check the tyranny of the democratic majority as it sailed toward the shoals of disunion and civil

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25. John Marshall, *Friend to the Union*, in JOHN MARSHALL’S DEFENSE OF *MCCULLOCH V. MARYLAND* 78, 81 (Gerald Gunther ed., 1969).

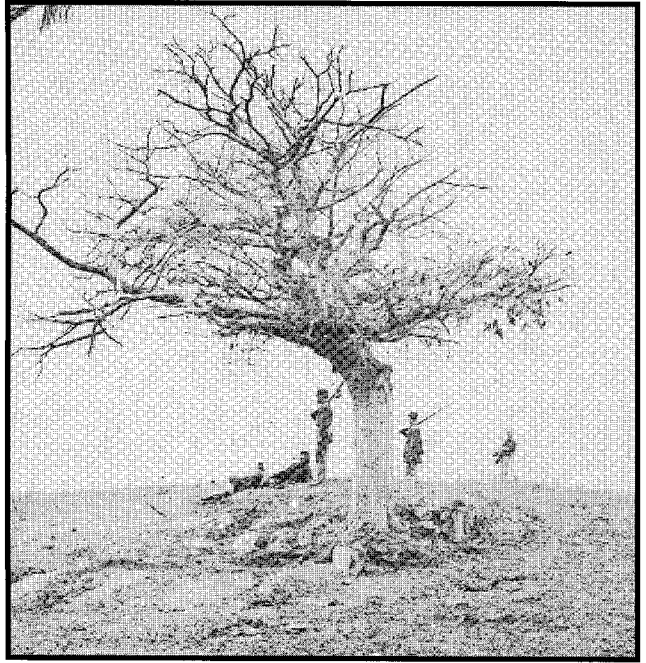
26. RALPH WALDO EMERSON, *Self Reliance* in EMERSON: ESSAYS AND LECTURES 267 (Library of America ed. 1983) (ESSAYS FIRST SERIES 1841).



war. Instead of saving the old republic from the forces of radical democracy, however, the Court was overtaken by them—"revolutionized" from the inside by new Jacksonian appointees. Marshall didn't live to see the states' rights nature of the new Democratic majority on the Taney Court, but he saw the writing on the wall. And he feared for what he read.

The Civil War Marshall feared would come eventually did—

and at unimaginable costs to both sides. For someone trying to assess Marshall's career, and particularly his struggle with Jefferson, it is hard not to read antebellum history backwards with the war in mind. The war was a crushing blow to Marshall's dream of a law-abiding, Court-obeying republic. Perhaps there is no sadder or more telling symbol of that failure than one of Alexander Gardner's Civil War photographs: the shallow grave of a soldier at the foot of a battle-scarred tree, the tree silhouetted against the sky. Beneath the tree's fractured branches stand several soldiers, leaning battle-weary on their rifles or standing strangely at attention. The photograph was taken after Antietam's bloody work was done. The dead soldier, from the Twenty-eighth Pennsylvania Volunteers, was Private John Marshall. The unfortunate soldier was not a namesake, but in an age famous for remembering famous men, he easily could have been. In any case, the image conveys a tragic truth: What Marshall had feared, what he had worked to avoid, had come to pass. The rule of law as a rational way of settling disputes had given way, first to political demagoguery and ideological extremism in the North and South, then to the lord of battles. The Union he hoped to preserve by adhering to the Constitution had gone to war over its meaning. His own state, his own grandchildren, fought against the nation he had fought to create. Indeed, when Robert E. Lee surrendered to Ulysses S. Grant at Appomattox Court House, the young officer by his side was Marshall's grandson,



**Stereo-graph view  
"A Lone Grave on the Battlefield of Antietam." Alexander Gardner (1821-1882) Series: Brady's Album Gallery, 570 Stereo-graph PR-065-788-02.**

**Courtesy of the New-York Historical Society.**

Col. Charles Marshall. Out of the bloody conflict would come a new birth of freedom, to be sure, and the Union endured, stronger for having withstood the stress of war. So, of course, did the Supreme Court. But the new era was light-years removed from Marshall's world and hostile to much that was dear to him. Ironically, it was this pulsating, chaotic age that bestowed on him its highest honors and fame that he doubted would ever be his.

